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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1500

FRED MCCORD AND KERRY LUZADER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were deprived of due process of law because the government failed to disclose alleged *Brady* material and failed to record the grand jury proceedings leading to their indictment. They also claim that the trial court erred by admitting testimony of a government witness concerning other criminal conduct by petitioners, and in giving certain jury instructions over defense objection.

After a jury trial in the United States District Court for the Southern District of Indiana, petitioner McCord was convicted of one count of distributing cocaine on August 27, 1972, in violation of 21 U.S.C. 841(a)(1), and one count of knowingly using a telephone to facilitate the unlawful distribution of cocaine, in violation of 21 U.S.C. 843(b).

Petitioner Luzader was convicted of one count of using a telephone to facilitate McCord's distribution of cocaine on August 27, 1972, in violation of 21 U.S.C. 843(b), and one count of distributing cocaine on September 5, 1972, in violation of 21 U.S.C. 841(a)(1). Both petitioners were sentenced to concurrent terms of three years' imprisonment, to be followed by a special parole term of three years; in addition, McCord was fined $5,000. The court of appeals affirmed the convictions (509 F.2d 891; Pet. App. 1-10) and denied a petition for rehearing on April 24, 1975. The petition for a writ of certiorari was filed on May 27, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the petition.

The facts concerning the August 27 and September 5 transactions, which petitioners do not dispute, are set forth in the opinion of the court of appeals. Agents Jovonovich and Standifer of the Bureau of Narcotics and Dangerous Drugs arranged with a confidential informant, William Paige, to participate in and observe a planned purchase of cocaine from petitioner McCord at Paige's home (Tr. 531-532). On August 27, 1972, Standifer arrived at Paige's home, posing as the purchaser. In Standifer's presence, Paige received a telephone call from a person identifying himself as Luzader who inquired how much cocaine Paige wanted to buy. When Paige replied that he wanted one-fourth of an ounce, Luzader stated that "[they] would be out." Immediately thereafter, McCord called Paige and confirmed the planned transaction (Tr. 259-262).

A short time later, two persons arrived at Paige's home in a car registered to McCord. Paige went outside and returned with a bag containing 7.6 grams of cocaine. He told Standifer that the seller, whom he identified at trial as McCord, would not meet with Standifer but would deal with Paige. The agent gave Paige $250, and Paige again went outside

to complete the transaction (Tr. 264-270). Officer Murphy of the Anderson, Indiana Police Department, who was assisting the federal agents, witnessed the transaction from a distance and, at trial, he positively identified the seller as McCord (Tr. 571).

Thereafter, Paige arranged to make another purchase of cocaine. After discussing the purchase with Agent Standifer, he called Luzader's telephone number. When Luzader returned the call, Paige informed him that he wanted to buy one ounce of cocaine (Tr. 272).

On September 6, 1972, a man driving a Volkswagen registered to Luzader arrived at Paige's home. Paige went out to the car and gave the occupant $900 in return for an ounce of cocaine (Tr. 284-291). As Paige counted out the money in the car, Agents Standifer and Kleppinger observed the driver through binoculars from a second story window of Paige's home. At trial, the agents identified the driver as Luzader (Tr. 612-613).[1]

1. At a pretrial hearing, the district judge instructed the prosecutor to give the defense a current and complete report of the criminal record of William Paige, whom the government intended to call as a witness, and to make members of the Anderson Police Department available to the defense in order to define Paige's working relationship with the

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[1]The indictment charged each petitioner with using "a communication facility, that is, a public telephone." However, 21 U.S.C. 843(b) proscribes the use of any "public" *or* "private" "communication facility," and the evidence amply demonstrated that each petitioner used a telephone and thus violated the statute. Whether reference to "a public telephone" in the indictment be viewed as surplusage or an immaterial variance, petitioners were aware of the variance between indictment, on the one hand, and statute and proof, on the other, at least as early as a pre-trial conference at which the prosecutor indicated he did not know the locations of the telephones used. See Tr. 28-29. Petitioners did not then allege an inability to defend or any other prejudice, nor did they do so in the court of appeals or here. In any event, petitioners' respective sentences on the communications facility counts were made concurrent to their sentences on the distribution counts.

police. At trial, on cross-examination out of the jury's presence, Paige was shown a copy of the criminal record that had been given the defense by the prosecutor; he testified that it did not fully reflect his record of past arrests (Tr. 808).[2] Petitioners contend that the government's failure to assure the completeness of Paige's record violated *Brady* v. *Maryland*, 373 U.S. 83.[3]

As the court of appeals ruled, there was no evidence that the government intentionally failed to disclose facts regarding Paige's criminal record. Nor is there a reasonable likelihood that the omitted evidence pertaining to Paige's criminal past would have altered the jury's appraisal of his credibility. In the absence of either intentional non-compliance by the government or demonstrated prejudice, petitioner has not been denied due process of law.

Paige was exhaustively examined in the jury's presence regarding the full range of his prior criminal misconduct and his incentive for cooperating with the police. He testified that in return for his cooperation in this case, he had hoped that charges against him involving the unlawful possession of a firearm and narcotics possession would be dismissed (Tr. 296, 311, 337). He testified that he previously had been convicted of assault and battery and unlawful possession of a gun (Tr. 296); had been arrested

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[2]Paige was asked whether he recalled having told defense counsel that the record had been "cleaned up," and replied, "I think so." He also stated, however, that on several occasions when he had talked to defense counsel he had not refused to answer any question they had asked him (Tr. 806-808).

[3]Petitioners also point out that Officer Murphy of the Anderson Police Department, who had been made available to the defense pursuant to the court's order, conceded in his testimony out of the jury's presence that he had not initially given to the defense certain hearsay reports concerning Paige's involvement in selling drugs at his place of employment. Petitioners' claim (Pet. 9) that Murphy had not been "candid and complete" in his dealings with them is groundless, however, for they concede that two days later—after he had attempted to verify the "anonymous" information—Murphy related the reports to defense counsel (Tr. 799-801).

several times for carrying firearms (Tr. 329); had unlawfully sold firearms (Tr. 318) and brass knuckles (Tr. 349); had possessed large quantities of switchblade knives intending to sell them (Tr. 348); had himself repeatedly used cocaine and other drugs (Tr. 313-315); and currently drank considerably (Tr. 335). He had been dismissed from his job as a tool maker after being caught making hand guns on the factory machines (Tr. 433).[4]

In these circumstances, any additional information that the government might have produced concerning Paige's criminal background would have been merely "cumulative or embellishing" on the issue of Paige's credibility. *Giles* v. *Maryland*, 386 U.S. 66, 100 (Fortas, J., concurring). As the court of appeals correctly stated (Pet. App. 5):

> * * * [S]ince [Paige] thoroughly and candidly answered questions during cross examination regarding his past criminal record, other criminal activities, and any promises made by the government to him in return for his cooperation, it seems clear that defendant was not prejudiced by the inaccurate and incomplete information which he had received in this regard prior to trial. If the government had intentionally failed to accurately disclose such relevant information after disclosure had been directed by the trial court, defendant's failure to demonstrate prejudice would not necessarily be controlling, and reversal of the conviction might well be warranted. Moreover, where the government's failure to satisfactorily comply with such an order is the product of negligence, rather than bad faith, reversal might nevertheless be required where prejudice is shown. * * * But here, McCord has demonstrated neither bad faith nor prejudice, thus distinguishing the facts of this case from those of [*United States* v. *Ott*, 489 F.2d 872 (C.A. 7)] and requiring our rejection of McCord's claim that he was denied due process of law.

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[4]The defense called as a witness Jeffery Doyle, who testified that Paige had a reputation for violence and dishonesty, and that he had first known Paige as a dealer in marihuana (Tr. 755-756).

2. Petitioners contend (Pet. 13-17) that the government's failure to record the grand jury testimony leading to their indictment deprived them of an important means of impeaching the trial testimony of Agent Standifer, and therefore denied them due process of law.[5]

But there is no constitutional or statutory requirement that grand jury testimony be recorded. See, *e.g.*, *United States* v. *Battisti*, 486 F.2d 961, 963-964 (C.A. 6); *United States* v. *Arradondo*, 483 F.2d 980, 984 (C.A. 8), certiorari denied, 415 U.S. 924; *Baker* v. *United States*, 412 F.2d 1069, 1073 (C.A. 5), certiorari denied, 396 U.S. 1018; *Loux* v. *United States*, 389 F.2d 911, 916 (C.A. 9), certiorari denied, 393 U.S. 867. Petitioners are mistaken in suggesting that the Jencks Act, 18 U.S.C. 3500, presupposes an obligation by the government to record that testimony. The 1970 amendment to the Act provides only that the term "statement" shall include "a statement, however taken or recorded, or a transcription thereof, *if any*, made by said witness to a grand jury" (18 U.S.C. 3500(e)(3); emphasis supplied). It did not obligate the government to record grand jury testimony. As the report of the Senate Committee on the Judiciary stated (S. Rep. No. 91-617, 91st Cong., 1st Sess., p. 144 (1969)):

> There is no intention, however, to require that grand jury testimony be recorded. This follows the prevailing present practice of making recordation optional. * * * The statute is intended to come into operation only if such recordation is undertaken.

Rule 6(d), Fed. R. Crim. P., which enumerates the persons who may be present during grand jury proceedings, permits, but does not require, the presence of "a stenographer or operator of a recording device." See *United*

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[5]The defense had received before trial copies of Standifer's three investigative reports (Tr. 489-491).

States v. *Franklin*, 429 F.2d 274, 276 (C.A. 8), certiorari denied, 400 U.S. 967; *Loux* v. *United States, supra*, 389 F.2d at 916. Moreover, while Rule 16(a)(3) provides that the district court may order disclosure of "recorded testimony of the defendant before a grand jury," the notes of the Advisory Committee state that "[d]isclosure is required only where the statement has been recorded and hence can be transcribed." Advisory Committee Note to Rule 16, Fed. R. Crim. P., 18 U.S.C. App., p. 4494.[6]

3. Over defense objection, the government's final witness, Michael Hoppes, testified that early in September, 1972, he had spoken to petitioner McCord about purchasing cocaine (Tr. 665-667). McCord replied that the cocaine would cost $900 an ounce (Tr. 668). On September 8, 1972, Hoppes arranged by telephone to complete the transaction.

Hoppes later approached McCord in a supermarket parking lot and McCord told him that Luzader had the cocaine in a nearby filling station parking lot. Hoppes approached Luzader, who was seated in his car, and was given one ounce of cocaine (Tr. 671-674). Subsequently, Hoppes unwittingly sold the cocaine to Agent Standifer, and then paid McCord the $900 purchase price (Tr. 676-677).

Petitioners contend that the trial court committed prejudicial error by admitting this evidence of criminal conduct other than that charged in the indictment. However, the court of appeals correctly held that the evidence was admissible to show a similar *modus operandi* (Pet. App. 8):

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[6]Petitioners' reliance on *United States* v. *Bryant*, 439 F.2d 642 (C.A.D.C.), is misplaced. While that case established for the District of Columbia Circuit that the duty to disclose *Brady* and otherwise discoverable material necessarily contemplates the duty to preserve it, the case does not require the prosecutor to "create" such material. It cannot be read to suggest that because grand jury testimony must be produced if recorded, it necessarily must be recorded.

> Hoppes' testimony * * * was admissible to show *modus operandi*, since the Hoppes' transaction, occurring close in time to those alleged in the indictment, bore a remarkably strong resemblance to the pattern of conduct with which defendants were charged. *United States* v. *Hampton*, 457 F.2d 299, 302 (7th Cir. 1972), [certiorari denied, 409 U.S. 856]. The type of narcotics sold to Hoppes, cocaine, was the same as that sold on occasions alleged in the indictment. It was sold from an automobile for $900.00 per ounce after the transaction had been arranged by telephone. Finally, the Hoppes transaction occurred within a week to ten days of the offenses charged in the indictment. As this Court stated in *United States* v. *Jones*, 438 F.2d 461, 466, wherein the admission of such evidence was upheld,
>
> > "[t]he June 5th sale of cocaine was a similar offense, proximate in time, involved the same three individuals * * * and an almost identical *modus operandi* was employed. It bore a singular strong resemblance to the pattern of the offense charged. And, it was so related to and connected with the crime charged that the proof of the one tended to corroborate the proof of the other."[7]

4. Petitioners contend, finally, that two jury instructions, given by the court over defense objection, were erroneous and prejudicial.

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[7] Petitioner's reliance on *United States* v. *Broadway*, 477 F.2d 991 (C.A. 5), is misplaced. There the government introduced evidence of other crimes characterized by the court as "vague and uncertain" in order "to shore up a weak case as to intent and guilty knowledge." *Id.* at 995. Here, in contrast, the evidence of other crimes "bore a remarkably strong resemblance to the pattern of conduct" charged. Moreover, the government's case without the proof of other crimes was strong, resting in part on the eyewitness observation of the drug sales by federal agents and local police.

Instruction No. 20 defined the purposes for which the jury could consider Hoppes' testimony. In relevant part, it stated (Tr. 857-858):

> * * * [Y]ou the jury may consider such evidence of the witness', Hoppes, transaction that you find beyond a reasonable doubt to be a transaction of a like nature as those charged in the Indictment and as indicating an independent voluntary disposition during and prior to the transactions charged in the Indictment to violate the narcotic laws of the United States of America, in determining the state of mind or intent with which the defendant Fred McCord and/or the defendant Kerry Luzader did the acts respectively charged against them. And if you find beyond a reasonable doubt that all of the factual and legal elements of the transaction of the witness Hoppes with the defendant Fred McCord, and/or the defendant Kerry Luzader, did occur and was of a like nature to that of the offenses charged against defendants in the Indictment in this case, the jury may, but is not obliged to, draw the inference and find that in doing the act charged in the Indictment the accused acted knowingly, wilfully, intentionally and unlawfully, and not because of mistake or accident or other innocent reason, or unlawfully entrapped or induced to commit a crime.

Petitioners complain that the jury should have been instructed to consider Hoppes' testimony relating to other crimes, if at all, only as proof of *modus operandi*. However, the court's limiting instruction was proper in the circumstances and did not prejudice petitioners.

The court instructed that the jury could consider the evidence of other crimes only after it had found beyond a reasonable doubt that petitioners had in fact distributed the cocaine. Moreover, since 21 U.S.C. 841(a) requires proof that the crime be committed "knowingly or in-

tentionally," intent was an issue and it therefore was appropriate to instruct that the other crimes evidence was relevant to state of mind or intent. Finally, the jury was effectively instructed that the other crimes evidence was relevant to *modus operandi* when the court charged that Hoppes' testimony could be considered to determine whether petitioners had acted "because of mistake or accident or other innocent reason" (Tr. 858). The fact of having committed a crime of similar *modus operandi* is obviously relevant to intent and undermines any inference that the act was done innocently or by mistake or accident.

Instruction No. 25, which petitioners also challenge, was a standard entrapment instruction. See Tr. 874-876. Defense counsel had objected to any instruction on entrapment and stated that they did not intend to argue that defense. The court of appeals, having concluded that Hoppes' testimony was not admissible as anticipatory proof of predisposition, noted (Pet. App. 9) that "[u]nder these circumstances, it would have been a better practice to sustain defendants' objection to the giving of the instruction." The court concluded, however, that giving the instruction in this case was harmless error (Pet. App. 9-10):

> We note, however, that the instruction given by the court did not advise the jury that the defendants admitted the acts alleged in the indictment, nor did it assert that the defendants were relying upon entrapment as their defense. The instruction merely informed the jury that, even if the government proved the conduct alleged in the indictment, defendants could nevertheless be acquitted if the jury should find that the defendants "had no previous intent or purpose to commit any offense of the character here charged, and did so only because [they were] induced or persuaded by some law enforcement officer,

* * *". Under these circumstances, any error in the giving of Instruction No. 25 must be considered harmless.

Moreover, the court had previously instructed the jury that by their plea of "not guilty" the defendants had put in issue every essential element of the crimes charged, including identity (Tr. 834, 839). Accordingly, petitioners' claim (Pet. 18) that the entrapment instruction "was tantamount to a directed verdict of guilty" is groundless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

DOJ-1975-07